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SUBJECT: EU COMPETITION AUTHORITIES HOPE TO MAKE GOOD U.S.-EU COOPERATION EVEN BETTER

¶11. (SBU) SUMMARY. DG Competition officials told USEU January 14 they hope to work closely with the Obama Administration to improve already strong U.S.-EU competition policy cooperation. Officials in the DG Competition Chief Economist's office and International Unit said bilateral cooperation has been strong on mergers and cartels but can improve in the antitrust area. The officials hoped that an Obama DOJ will move closer to FTC positions on mergers and unilateral conduct by firms. DG Competition's chief economist stressed the increasing role of economic analysis in EU competition case review, and said high-profile cases against Intel and Microsoft support this trend and have not weakened EU support for IP protection. The officials seek to cooperate with the U.S. on support for new competition agencies in India, China and elsewhere. While the Competition Commissioner and Director General will change late this year, DG COMP's keen interest in engaging with new senior U.S. officials offers a good opportunity to deepen this important relationship. END SUMMARY.

DG COMP OFFICIALS SEEK TO IMPROVE ALREADY STRONG U.S.-EU COMPETITION COOPERATION

¶12. (SBU) Dominique Van Der Wee, Unit Head for International Relations at the European Commission Directorate General for Competition (DG COMP), told USEU January 14 that Competition Commissioner Kroes, Director General Philip Lowe, and other DG COMP officials value highly their existing close relations with U.S. competition officials at the Federal Trade Commission (FTC) and Department of Justice (DOJ). Van Der Wee said DG COMP sees a difference in antitrust enforcement attitudes between FTC and DOJ, however, and expressed the hope that incoming Obama DOJ officials will move toward FTC's "more aggressive" positions, particularly on mergers and unilateral conduct by firms. He said that existing bilateral cooperation has been strong on mergers and cartels, but can improve in the area of unilateral conduct. He noted that a U.S.-EU agreement in fall 2008 to establish high-level regular phone calls on unilateral conduct cases, to function as an "early warning" system of major actions, has yet to be implemented fully; he hoped this could resume with incoming officials by March.

¶13. (SBU) Van Der Wee said there is "enormous interest" throughout DG COMP in meeting incoming senior FTC and DOJ officials, perhaps at the ABA Conference in Washington March 25-27.

¶14. (SBU) On February 2 USEU EconMin heard the same message of

cooperation from DG COMP chief economist Damien Neven and two members of his team (Oliver Stehmann, deputy chief economist, and Miguel de la Mano, economist). Neven said his office has had good relations generally for the past few years with the economists' teams at FTC and DOJ, although in 2008, relations were less active due to the pending U.S. presidential transition. He said he had suggested recently to DOJ that the annual chief economists' exchanges be restarted, possibly in July this year, and seemed to get a positive response. Neven explained that working level contacts on mergers have continued to be particularly strong, noting extensive DG COMP-FTC discussions during consideration in late 2007 and early 2008 of Google-DoubleClick merger (NOTE: which both the U.S. and EU approved. End note).

BUT CHALLENGES REMAIN OVER ANTITRUST COOPERATION

¶ 15. (SBU) Neven noted that antitrust cooperation has been more complicated, and suggested that more extensive U.S. confidentiality requirements may limit useful information exchange after the USG has opened an investigation. He said this leads the U.S. side "to ask lots of questions but not be able to share as much." (Note: U.S. and EU rules on confidentiality waivers differ in some respects, but the U.S. can share information with waivers. End note).

¶ 16. (SBU) Neven also pointed to the "wide gap" between FTC and DOJ over unilateral conduct, which he said had made it more difficult to establish points of common concern with the USG. He said DG COMP hopes that the DOJ enforcement report on Section 2 of the Sherman Antitrust Act was an "outlier," in

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advocating a "more extreme position," and thought this view would change under the Obama team. (Note: the 2008 report covered unilateral conduct by firms, and was not endorsed by FTC. End note). Neven did say that Deputy Director General for antitrust and mergers Nadia Calvino's one conference call in 2008 with DOJ and FTC was very productive, however, and hoped these could continue.

ROLE OF EU CHIEF ECONOMIST IN CASE REVIEW

¶ 17. (SBU) USEU asked about Neven the evolving role of the Chief Economist's office in DG COMP review of competition cases. Neven said there has been a consistent trend for stronger economic input on "theory of harm" into case analysis, with measurable results. (Comment: EU competition law has evolved from a purely legal analysis to more emphasis over the last decade on economic impacts in evaluating antitrust and merger concerns. End comment). Neven highlighted the example of the RyanAir-Aerlingus merger report from 2008, which contains 100 pages of economic analysis (of 400 total).

¶ 18. (SBU) Neven's office details one to three staff to specific DG COMP case teams, he continued. He said his team is increasingly involved in sectoral inquiries, with three of his staff working on the ongoing pharmaceutical inquiry. (Note: DG COMP issued a preliminary report on its major pharmaceutical inquiry in November; the final report is expected in mid-2009). Neven's office was less involved in the influential 2005 energy sectoral inquiry, which led to the proposed EU 3rd energy liberalization package. (Note: this package remains under consideration by the EU Council and Parliament. End note).

¶ 19. (SBU) Neven underscored, however, the "schizophrenic" nature of his office, which remains independent from the case teams even as it supports case review. He noted that the non-horizontal merger guidelines, adopted a year ago, have led to the issuance of different analyses than would have earlier been the case. He also said his office had been heavily involved in state aid review of the many recent financial sector bailouts, and has played a strong policy development

role here.

CHIEF ECONOMIST: KEY CASES SUPPORT TREND TOWARD ECONOMIC ANALYSIS, DON'T UNDERMINE IP RIGHTS

¶110. (SBU) USEU asked Neven's views on Intel's concerns that the Commission's seven-year case against the firm for potential antitrust violations has been "politicized." He said it was strange that Intel didn't respond to the Commission's second Statement of Objections (SO) charging the firm with potential violations. He thought the European Court of First Instance (CFI) correct in tossing out in early February Intel's argument for an extension of its time to prepare its case. He said Intel may think the Commission has been very selective in reviewing evidence, but said Intel has itself been very selective in arguing its position. He said that both SOs against Intel were economic effects-based, rejecting Intel's argument that the Commission dropped an effects-based position in its second SO. At Intel's hearing last year, Neven said a "junior member" of the legal team had stood up and said "remember the case law," which doesn't directly require effects-based analysis, which Neven considered the basis for Intel's (unjustified) claim that the Commission is ignoring economic effects in evaluating the firm's case.

¶111. (SBU) USEU raised concerns increasingly expressed by the private sector concerns that DG COMP decisions have begun to undermine support for intellectual property (IP) rights in Europe. Neven disagreed with this view, declaring that the 2004 Microsoft decision was a special case soundly based on refusal to supply, with the decision and subsequent CFI decision expressly recognizing IP rights. His staff explained that the recent Article 82 guidance paper incorporated these experiences and lays out how to operationalize such special tests.

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INTEREST IN COOPERATION ON THIRD COUNTRIES

¶112. (SBU) Van Der Wee said DG COMP seeks to develop a coordinated approach with the U.S. on technical support for new third country competition agencies, beginning with India, currently establishing its agency. He added that DG COMP also seeks to encourage China to join the International Competition Network (ICN), which may require asking Taiwan to change its nameplate at ICN, a sensitive issue.

COMMENT

¶113. (SBU) DG COMP clearly expects the advent of a new Administration will bring changes to U.S. competition enforcement, and hopes this will "bring the U.S. closer" to EU positions on unilateral conduct and other key issues. Competition Commissioner Kroes' term will end with the European Commission changeover at the end of this year, while Director General Philip Lowe will be replaced by Alexander Italianer, a Dutch economist with whom USEU has strong ties. EU perceptions of prior U.S.-EU divergences in approach on key competition issues may be exaggerated, but DG COMP's keen interest in engaging with new senior U.S. officials offers a good opportunity to deepen this important relationship. END COMMENT.

MURRAY